COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 051145-01**

Margaret Murphy	Claimant
William C. and Zu Cowperthwaite	Employer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Carroll and McCarthy)

APPEARANCES
Franklin Lewenberg, Esq., for the claimant
Janet E. Boyle, Esq., for the Workers' Compensation Trust Fund
Mark H. Likoff, Esq., for the employer

COSTIGAN, J. The claimant, the Workers' Compensation Trust Fund and the uninsured employer,[1] all appeal from a decision finding that the claimant was an employee, within the meaning of G. L. c. 152, § 1(4), and awarding her a closed period of § 34 temporary total incapacity benefits for a slip and fall injury that occurred while she was working in a full time child care position for the Cowperthwaites. We summarily

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[1] General Laws c. 152, § 65(2), provides in pertinent part:

> There is hereby established a trust fund in the state treasury, known as the Workers' Compensation Trust Fund, the proceeds of which shall be used to pay or reimburse the following compensation: . . . (e) payment of benefits resulting from approved claims against employers subject to the personal jurisdiction of the commonwealth who are uninsured in violation of this chapter. . . .

Section 65(8) further provides:

> If the trust fund pays compensation to a claimant pursuant to clause (e) of subsection (2), it may seek recovery from the uninsured employer for an amount equal to the amount paid on behalf of the claimant under this chapter, plus any necessary and reasonable attorney fees. Any action by the trust fund to seek recovery from the uninsured employer shall be commenced within twenty years of the claimant's filing a claim for benefits under this chapter against the trust fund.

The uninsured employer was joined to the proceeding upon the Trust Fund's motion, pursuant to 452 Code Mass. Regs. § 1.20. (Dec. 2.)

affirm the decision as to the claimant's appeal, which challenges the judge's extent of disability and earning capacity findings. The Trust Fund's and the employer's appeals are based on the assertion that the judge erred in finding that the claimant was indeed an "employee" within the meaning of G. L. c. 152, § 1(4). The Fund and the Cowperthwaites argue that 1) the claimant was not a domestic servant, and 2) even if she was a domestic servant, she was excluded from coverage under the act as one "whose employment [was] not in the usual course of the trade, business, profession or occupation of [her] employer . . . ." Id. We disagree with their interpretation of the relevant statutory provisions, and affirm the decision.

Margaret Murphy had been a professional child care technician ("nanny") for her entire working life, which spanned 38 years and five families prior to her July 2001 hire by William and Zu Cowperthwaite. The position offered by the Cowperthwaites was for the provision of full-time child care at their home. (Dec. 3.) The claimant actually worked in excess of forty hours per week on a regular basis from the time that she started in early September 2001 until her injury, and there was no clearly articulated termination date for her services. (Dec. 6.) On October 15, 2001, while attempting to answer the telephone in the Cowperthwaites' home, Ms. Murphy tripped on a rug, suffering a laceration of the forehead and a broken right shoulder. (Dec. 3.)

"Whether the claimant was a domestic servant was a question of fact for the determination of the [administrative judge]." Brewer's Case, 335 Mass. 128, 129 (1953). The judge wrote: "The threshold issue in this case is whether or not an employee-employer relationship existed between Ms. Murphy and Mr. Cowperthwaite, as opposed to her being an independent contractor." (Dec. 5.) We set forth the judge's findings pertinent to that issue:

> The parties do not dispute that an oral contract of hire was entered into by them bringing Ms. Murphy into the Cowperthwaite residence. I find this arrangement properly can be classified as a "domestic servant," since Ms. Murphy was performing only those usual tasks associated with child care, some laundry, and meal preparation that require no special training or expertise and which are normally done by members of any household if they are not in a position to hire others to assist in these duties. I draw a reasonable inference from the testimony

> presented that when Ms. Murphy was not present in their household, including the weekends, these tasks were performed by either Mr. or Mrs. Cowperthwaite without outside assistance. (The broad classification of "domestic servant" can be deemed to include various titles: Butler, maid, cook, driver/chauffeur, groundsman, nanny, tutor, "au pair," and cleaner, for example.) There is no dispute that she worked in excess of forty hours per week, on a regular basis, with no clearly articulated termination date for this relationship. There was no evidence presented that Ms. Murphy was offering her services to other households at the same time. Thus, her situation does not fall within the "elective coverage" exclusion of this paragraph for "seasonal, casual, or part-time domestic servants." I find that the inclusive language of the statute regarding compulsory coverage clearly encompasses the work of Ms. Murphy since her situation does not fit within any of the enumerated exceptions to the definition of "employee."
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> Based on these considerations, I find that Ms. Murphy was hired by the Cowperthwaite's [sic] as a full-time domestic employee as of September 4, 2001, for the purpose of child-care at an average weekly wage of $600.00. I find that Ms. Murphy did not act as an independent contractor, offering similar services to other customers/employers at any time during her employment in the Cowperthwaite household. Based on a review of her entire career, I find a clear pattern that she worked in a similar situation for only six employers over her 38-plus year career as a nanny, and that some of those employers withheld payroll taxes from her wages while others did not. I am not persuaded by any of the testimony or arguments that Ms. Murphy was an independent contractor to the Cowperthwaite's [sic], nor that the parties mutually agreed that her period of employment was intended to be a short-term matter until Mrs. Cowperthwaithe's [sic] parents returned from China.

(Dec. 5-6.) The judge awarded the claimant weekly incapacity and medical benefits accordingly. (Dec. 9-10.) That award is not germane to the issues we now address.

Two statutory provisions are relevant to the appeal before us, and both are found within the § 1(4) definition of "employee":

> "Employee" [shall mean] every person in the service of another under any contract of hire, express or implied, oral or written, *excepting . . . (g) a person whose employment is not in the usual course of the trade, business, profession or occupation of his employer*. . . .
>
> . . .
>
> The provisions of this chapter shall remain elective as to employers of seasonal or casual or part-time domestic servants. For the purpose of this paragraph, a part-

> time domestic servant is one who works in the employ of the employer less than sixteen hours per week.

General Laws c. 152, § 1(4), as appearing in St. 1998, c. 161 (emphasis added.)

We reject the employer's and the Trust Fund's first contention that Ms. Murphy was a not a "domestic servant," as that designation has always been understood. Statutory language should be accorded its commonplace and generally accepted meaning, unless other contextual considerations point to a different result. "[A]bsent clear indication to the contrary, statutory language is to be given its 'ordinary lexical meaning.' " Commonwealth v. Rahim, 441 Mass. 273, 275 (2004), quoting Surrey v. Lumbermen's Mut. Cas. Co., 384 Mass. 171, 176 (1981). A "domestic servant" is one who is hired to do "various activities associated with household duties." Brewer's Case, supra. See, anachronistically, Bell v. Sawyer, 313 Mass. 250, 252 (1943)(in affirming directed verdict for defendant homeowner in tort action, court stated that plaintiff domestic servant's work -- doing laundry at and closing of defendant's summer house -- "was of a sort concerning which every housewife has ideas and desires, which she wishes carried out").

While there is no Massachusetts case addressing the point, we think that caring for children is certainly among the many household duties that may be performed by domestic servants. Other states' courts, along with federal law, support the proposition:

> "Domestic" is defined as "relating to the household *or the family*; concerned with or employed in the management of a household or private place of residence." Webster's Third New International Dictionary 671 (1981)(emphasis added). Black's Law Dictionary 435 (5th ed. 1979) defines a "domestic servant" as "[a] person hired or employed primarily for the performance of household duties and chores, the maintenance of the home, *and the care, comfort, and convenience of members of the household*." (emphasis added.)
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> In its generally accepted meaning, domestic work, therefore, includes care of persons in a household as well as care of the house. Gunter v. Mersereau, 7 Or. App. 470, 491 P.2d 1205 (Or. App. 1971). See Evans v. Webster, __ P.2d __, [sic] (Colo. App. No. 89CA2026, July 5, 1991)(although § 8-40-302(4)[exemption from workers' compensation for part-time domestic workers] was inapplicable because employment was full time, home health care aide stated to be engaged in

> domestic work); 20 C. F. R. § 404.1057(b)(under Social Security Act, domestic service includes services by governesses and babysitters); 29 C. F. R. §§ 552.3 and 552.101 (1991)(under Fair Labor Standards Act, domestic service employees include governesses and babysitters). See also Smith v. Ford, 472 So.2d 1223 (Fla. App. 1985); Hayes v. Moss, 527 So.2d 373 (La. App. 1988). . . . We conclude that child care is "domestic work" within the scope of [Colorado's workers' compensation act].

Connor v. Zelaski, 839 P.2d 501, 502 (Colo. App. 1992). We therefore agree with the judge that Ms. Murphy was a "domestic servant" within the scope of G. L. c. 152, § 1(4).

Because Ms. Murphy worked full-time, in excess of forty hours per week, (Dec. 3, 6), she was not a part-time domestic servant, defined by statute as "one who works in the employ of the employer less than sixteen hours per week." G. L. c. 152, § 1(4). Because she worked "on a regular basis, with no clearly-articulated termination date" for her position with the Cowperthwaites, (Dec. 6), neither was her employment "seasonal or casual." Thus, affording Ms. Murphy workers' compensation coverage was not elective for the Cowperthwaites. As the administrative judge correctly found, they were required by statute to have a workers' compensation policy in place during Ms. Murphy's employment, and they did not. (Dec. 9.)[2]

We also disagree with the second argument advanced by the Trust Fund and the employer -- that, even given the above analysis, § 1(4) must be read to exclude Ms. Murphy from coverage under the act because her "employment [was] not in the usual course of the trade, business, profession or occupation of [her] employer." G. L. c. 152, § 1(4)(g). It is a well-established tenet of statutory construction that a specific statutory provision -- here, the inclusion of a full-time domestic servant in the definition of employee for the purpose of mandatory coverage under c. 152 -- cannot be trumped by the more general provision exempting from the definition of employee "a person whose employment is not in the usual course of the trade, business, profession or occupation of his employer. . . ." Id. "The two statut[ory provisions] may overlap in their coverage,

[2] Cf. Naiden v. Epps, 867 P.2d 215, 216 (Colo. App. 1993)(under Colorado statute, only those domestic workers who work more than forty hours per week, or for at least five days per week, are within scope of that act); Connor, supra (same); see footnote 5, infra.

but in the case of a conflict, the provisions of the specific statut[ory language] must govern . . . . To hold otherwise would be to overlook the careful limitation on . . . [mandatory coverage for domestic servants] and render . . . [it] surplusage." Cabot Corp. v. Baddour, 394 Mass. 720, 724-725 (1985), quoting Reiter Oldsmobile, Inc. v. General Motors Corp., 378 Mass. 707, 711 (1979).

> Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy, between them, the special statute, or the one dealing with common subject matter in a minute way, will prevail over the general statute.

Archer v. Turner Trucking & Salvage, 10 Mass. Workers' Comp. Rep. 166, 174 (1996), quoting 82 C.J.S. Statutes § 369 (§ 355 in 1999 ed.). See also Clancy v. Wallace, 288 Mass. 557, 564 (1934).

The Trust Fund and the employer argue that the Supreme Judicial Court's decision in Peters v. Michienzi, 385 Mass. 533 (1982), controls the outcome here. Again, we disagree. In Peters, a physician and his wife hired a carpenter to build a second home. While working on that job, the carpenter fell off a ladder and was injured. The court held that "[b]uilding a home for one's personal use is not a 'business' or 'occupation' as those terms are commonly understood," and concluded that the carpenter was not an employee of the doctor and his wife, for purposes of workers' compensation coverage. Id. at 536. It is noteworthy that the court found "no repugnancy between the definition of employee and the homeowner's exemption in the definition of employer,"[3] but acknowledged the very definitional repugnancy involved in the case before us:

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[3] Section 1(5) of G. L. c. 152, as amended by St. 1969, c. 755, § 1, defined "employer," in pertinent part, as:

> an individual, partnership . . . or other legal entity . . . employing employees subject to this chapter; provided, however, that the owner of a dwelling house having not more than three apartments and who resides therein, or the occupant of a dwelling house of another who employs persons to do maintenance, construction or repair work on such dwelling house or on the grounds or buildings appurtenant thereto shall not because of such employment be deemed to be an employer.

> It is an established rule of statutory construction that allegedly conflicting provisions of a statute should, if possible, be construed in a way that is harmonious and consistent with the legislative design. Everett v. Revere, 344 Mass. 585, 589 (1962). Price v. Railway Express Agency, Inc., 322 Mass. 476, 480 (1948). A person who does not fall within the homeowner's exemption because, for example, he does not "reside therein," or because the structure is not a "dwelling house," may, but need not necessarily, be an "employer." An "employer" is defined as one "employing employees subject to this chapter." The definition is dependent upon the definition of employee. A person cannot be an "employer" unless he hires an "employee." The exemption for homeowners does not purport to alter the relationship between those two terms. *In another context this court has acknowledged an inconsistency in the definition of employee. Ferris v. Grinnell, 353 Mass 681, 682-683 (1968)(noting a certain repugnancy between the purported inclusion of certain domestic servants within the Act's protection, and the exception for employment not in the usual course of the business of the employer).*

Id. at 537-538 (emphasis added.) It is the nature of the beast that domestic servants, working as they do in private households, will almost never be employed in the usual course of trade, business, profession or occupation of their employers.[4] However, unlike the carpenter in Peters, supra, the category of "domestic servant" is expressly mentioned in the statute which defines who is an employee under the act. "[W]henever possible, we [must] give meaning to each word in the legislation; no word in a statute should be

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[4] In Ferris, supra, the court stated:

> It is obvious that there is a repugnancy between this definition and the purported inclusion of certain domestic servants within the Act's protection, for it is difficult to see how such servants would be employed "in the usual course of the trade, business, profession or occupation of" the employer in running his home. The Act, it would seem, needs legislative clarification on this point. But how, absent such clarification, we would resolve this repugnancy need not be decided, for there is another ground which is dispositive of the case.

353 Mass. at 683. The statute at issue in Ferris provided that coverage remained elective as to persons employing three domestic servants or less. G. L. c. 152, § 1(4)(c), as amended by St. 1960, c. 306. Because the defendants employed only two other domestic servants, in addition to the plaintiff, the court held that the act, as to the defendants, was elective, and the plaintiff's tort action against them for their failure to have workers' compensation insurance could not be maintained. See G. L. c. 152, § 66.

considered superfluous." Petrucci v. Board of Appeals of Westwood, 45 Mass. App. Ct. 818, 823 n.8 (1998), quoting International Org. of Masters, Mates & Pilots, Atl. & Gulf Maritime Region, AFL-CIO v. Woods Hole, Martha's Vineyard & Nantucket S.S. Authy., 392 Mass. 811, 813 (1984).

If the Legislature had intended *all* domestic servants to fall outside the definition of employee in § 1(4), based on the "not in the usual course of trade . . . " exemption, it would not have specifically excepted from that definition, and therefore from mandatory coverage, "seasonal or casual or part-time domestic servants." Given that coverage is elective as to part-time domestic servants, as defined by the statute, the only logical, permissible construction of the statute is that coverage of full-time domestic servants is not elective, but rather mandatory, the exception for nonbusiness employment notwithstanding.[5] The construction of § 1(4) urged by the Trust Fund and the employer renders the "domestic servant" provision mere surplusage, a result we will not countenance.

Mindful of the Supreme Judicial Court's axiom that "[a] person cannot be an 'employer' unless he hires an 'employee,' " Peters, supra at 537, we conclude, as did the administrative judge, that Ms. Murphy, as a full-time domestic servant, was an employee of the Cowperthwaites, an employer for whom coverage under the act was mandatory,

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[5] We note that the Colorado statute on domestic workers, construed in the cases cited and quoted above, contains a similar general exclusion for nonbusiness employment, but also contains specific domestic worker language plainly making the nonbusiness employment exemption inapplicable to employers of full-time domestic workers. The Colorado workers' compensation act is

> not intended to apply to "employers of persons who do domestic work or maintenance, repair, remodeling, yard, tree, or scrub planting or trimming, or similar work about the private home of the employer if such employers have no other employees subject to . . . [the Workers' Compensation Act] and if such employments are not within the course of the trade, business, or profession of said employers. *This exemption shall not apply to such employers if the persons who perform the work are regularly employed by such employers on a full-time basis. For purposes of this subsection (4), "full-time" means work performed for forty hours or more a week or on five days or more a week.*

C.R.S. § 8-40-302(4), cited in Connor, supra at 502 (emphasis added.)

not elective. Accordingly, the decision is affirmed. Pursuant to § 13A(6), the Trust Fund is ordered to pay a fee to claimant's counsel of $1,276.27, plus necessary expenses.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **June 2, 2004**